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No. 86-

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1986

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CADWALADER, WICKERSHAM & TAFT,
*Petitioner,*

v.

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA,
*Nominal Respondent,*

-and-

DANIEL M. GOTTLIEB,
*Real Party in Interest.*

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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## QUESTIONS PRESENTED

1. Whether, under the crime-fraud exception to the attorney-client privilege, and the work product doctrine, a law firm may properly be required to produce documents reflecting attorney-client communications, and attorney work product, without *in camera* review or other evidence demonstrating that the attorneys were consulted for the purpose of furthering a crime.

2. Whether, under the joint-client exception to the attorney-client privilege, and the attorney work product doctrine, production of documents can properly be required when the party seeking disclosure was never a client of the attorney.

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Petitioner Cadwalader, Wickersham & Taft ("Cadwalader") respectfully prays that a writ of certiorari issue to review the order of the United States Court of Appeals for the Ninth Circuit denying a petition for a writ of mandamus, entered on October 24, 1986.[1]

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[1] Pursuant to Rule 21.1(b), the parties to the proceeding below are as follows:

Allan Carr, Cadwalader, Wickersham & Taft, Daniel M. Gottlieb, Sentinel Government Securities, Sentinel Financial Instruments, SGS, Inc., and Michael M. Senft.

## OPINIONS BELOW

The order of the court of appeals denying a writ of mandamus to the Central District of California is set forth in Appendix D, *infra*, p. 9a. The Order denying a petition for rehearing and a rehearing en banc appears in Appendix E, *infra*, p. 10a.

The orders of the Magistrate and of the district court affirming the Magistrate appear in the Appendices A and C, *infra*, pp. 1a, 5a, respectively.

## JURISDICTION

The order of the court of appeals denying a writ of mandamus was entered on October 24, 1986. The order denying a rehearing was entered on December 18, 1986. On March 4, 1987, Justice O'Connor entered an order extending the time for filing the petition until April 16, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## STATEMENT

In November, 1980, the plaintiff below, Allan Carr ("Carr"), purchased a tax shelter investment in a limited partnership known as Sentinel Government Securities ("SGS"). Thereafter, Carr brought an action in the United States District Court for the Central District of California, seeking to recover damages against SGS, Michael M. Senft ("Senft"), who was a general partner of SGS, Sentinel Financial Instruments ("SFI") and SGS, Inc. (collectively "the Sentinel defendants"). The suit arose out of Carr's purchase of his partnership interest. Carr also named as a defendant Cadwalader, Wickersham & Taft ("Cadwalader"), the law firm retained by Senft and SGS to render professional services and advice. Cadwalader's representation included, among other things, the preparation of a Private Placement Memorandum and a tax opinion letter in connection with Senft's offering of interests in SGS. As against Cadwalader, Carr

alleged federal and state securities law violations and common law claims, and sought compensatory and punitive damages, all based upon Cadwalader's professional advice to Senft and SGS.

A motion to dismiss filed by Cadwalader in the district court was granted in part and denied in part. Cadwalader then, after answering Carr's complaint, filed a third-party complaint for contribution against Carr's tax advisor and business manager, Daniel M. Gottlieb ("Gottlieb").

While issues relating to pleadings in this action were being resolved and before discovery was commenced, Senft and others were indicted and tried in the United States District Court for the Southern District of New York for criminal tax fraud and conspiracy involving Senft's activities in SFI and SGS. Cadwalader was never charged with any crime in connection with its representation of Senft or SGS, nor was Cadwalader accused of any wrongdoing before any regulatory authority or administrative agency. Neither SGS nor SFI were indicted.

In the criminal case, Senft was convicted on certain counts relating to his SFI activities. Senft was *not convicted* on any count involving any wrongdoing concerning investments by plaintiff Carr or any other individual in the SGS partnership (other than Senft). Indeed, although Count 38 of the indictment specifically charged Senft with tax fraud in connection with the very investment by Carr which is the subject of this action, Senft was not convicted on this count.

Senft was convicted on Count 1 of the indictment, a 29-paragraph count which charged a conspiracy to commit tax fraud based upon numerous overt acts by Senft and others between January 1979 and November 1983. Many of the overt acts involved Senft's activities in connection with SFI; others involved only SGS-related activity. Paragraph 22 of Count 1 charged Senft and others with certain overt acts, including the allegation that

they "ceased soliciting additional customers for SFI and created a new limited partnership SGS, of which SFI was a general partner, to market fraudulent tax benefits." The jury convicted on the conspiracy count but, as instructed at the time of trial, the jury need have found only one of the several overt acts charged over the four year period to convict Senft of conspiracy. Hence, there is no showing that Senft was convicted of any offense relating to SGS, or to Cadwalader's representation of SGS. Rather, the jury's verdict, when read in conjunction with the failure to convict on the specific counts relating to SGS, leads to the conclusion that the jury did *not* find true the charges concerning Senft's activities in SGS.

In the present case, third-party defendant Gottlieb, on May 7, 1985, served a request for production of documents on Cadwalader. Gottlieb himself never made an investment with SGS, never purchased an interest in SGS and, consequently, presumably never lost any money as the result of the alleged fraud committed by Senft and other Sentinel defendants. Gottlieb was never a client of Cadwalader; at no time did Cadwalader undertake to render legal advice or services to him.

Gottlieb's request for production of documents sought materials protected by the attorney-client privilege, and the work product doctrine. The requests encompass such matters as all documents (including work papers and notes) relating to "the preparation of the Private Placement Memorandum" (Request No. 22), "any representations made by Sentinel to Cadwalader in connection with the . . . Memorandum" (Request No. 23), "any investigations Cadwalader made of Sentinel at any time" (Request No. 25), and "Any and all documents which Cadwalader received from or transmitted to any person [conceivably including SGS and Senft] in connection with the preparation of the Private Placement Memorandum." (Request No. 7.)

Cadwalader duly raised and preserved objections based on attorney-client privilege and attorney work product.

The request for production was first heard by a magistrate who granted Gottlieb's motion to compel production on twenty-six of the document requests which Gottlieb served on Cadwalader (i.e., request nos. 6, 7, 10, 11, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 34, 35, 36, 37, 38, 39, 40, 41, 42). (App. 2a.) In rejecting Cadwalader's privilege objections, the magistrate based his ruling solely on the grounds of relevance and need (App. 4a):

> Well, it seems to me that the communications are at issue in a lawsuit, and certainly on balancing the need for the information versus the policy behind the privilege that need outweighs the privilege.

At no time did the magistrate review any documents *in camera*, or hear any testimony or take other evidence concerning the documents or the circumstances surrounding Cadwalader's representation of SGS or Senft. The magistrate's order contained no findings of fact or conclusions of law. App. 1a-3a.

Pursuant to Fed. R. Civ. P. 72(a), Cadwalader filed objections to the magistrate's order before the district judge. Cadwalader specifically offered the documents for *in camera* inspection.[2] The district court affirmed the magistrate's order and overruled Cadwalader's objections based on privilege. (App. C, *infra*, pp. 5a-8a.) Even though the district court recognized that the materials sought by Gottlieb were privileged, it nonetheless determined that the privilege was inapplicable. Addressing issues which were not considered by the magistrate, the

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[2] After arguing in its brief before the district court that its "attorney-client privilege objections are well founded . . . as to each of the disputed requests," Cadwalader's counsel stated: "However, should this court desire, Cadwalader is willing to submit the documents for *in camera* review." Memorandum in Support of Cadwalader's Objections to Magistrate Penne's Order, dated November 12, 1985, p. 21.

district court concluded that the crime-fraud exception to the attorney-client privilege or, alternatively, for documents prepared after Carr's purchase, the "joint client" exception to the privilege, justified disclosure to Gottlieb.

On the crime-fraud issue the court concluded (App. 6a):

> Even were the materials sought by third party defendant Gottlieb privileged, the parties seeking discovery need only make a *prima facie* showing in order to invoke the "crime/fraud" exception to the attorney-client privilege. *See, e.g., United States v. Hodge & Zweig*, 548 F.2d 1347, 1354 (9th Cir. 1977). It is significant in this regard that defendant Michael M. Senft was convicted on a single conspiracy that included both Sentinel Government Securities ("SGS) and Sentinel Financial Instruments ("SFI"), and that he was indicted on a large number of counts related to SGS—including one count based on transactions with the plaintiff. Especially in light of the extent to which the activities of SFI and SGI [sic] were apparently intertwined, the decision of the magistrate is supportable under the crime/fraud exception to the attorney-client privilege. *See generally In re Berkley*, 629 F.2nd 548, 552-55 (8th Cir. 1980).

At no time did the district court review any of the documents *in camera* or receive any testimony relating to Cadwalader's representation of Senft or Senft's purpose in consulting Cadwalader. Rather, it rendered its decision solely on the basis of attorneys' declarations which were devoid of information regarding the circumstances surrounding Senft's engagement of Cadwalader. While the district court noted that Senft had been indicted on the counts relating to SGS and Carr, the court ignored the fact that he had *not* been convicted on these counts. Moreover, the court's conclusion that the activities of SFI and SGS were apparently intertwined, and that for purposes of the crime-fraud exception the criminal ac-

tivity of SFI was the criminal activity of SGS, was wholly unsupported by the conviction in this case, and does not logically support the conclusion reached by the district court that SGS committed a crime or consulted Cadwalader in furtherance thereof.

On June 17, 1986, Cadwalader filed a Petition for a Writ of Mandamus in the United States Court of Appeals for the Ninth Circuit. This Petition was denied on October 24, 1986, by a panel of the Ninth Circuit. The order in its entirety reads as follows (App. 9a):

> The petition for writ of mandamus is denied. Petitioner has not demonstrated that the district court clearly erred in compelling the production of documents.

Cadwalader thereafter petitioned the Ninth Circuit for Rehearing and Suggestion for Rehearing *En Banc*, relying on the attorney-client privilege and the work product doctrine. This was denied on December 18, 1986. App. 10a. Like the district court, the court of appeals never received any document *in camera*.

## REASONS FOR GRANTING THE WRIT

### I. THE DECISION BELOW IS INCONSISTENT WITH A DECISION OF THIS COURT AND IS IN DIRECT CONFLICT WITH DECISIONS OF AT LEAST FOUR COURTS OF APPEALS

#### A. This Court's Decision in Kerr

In *Kerr v. United States District Court*, 426 U.S. 394 (1975), this Court stressed the importance of *in camera* review of documents claimed to be privileged. In a case with strikingly similar facts, the Court in an opinion by Justice Marshall, without dissent, reviewed the Ninth Circuit's denial of a writ of mandamus to compel a district court in California to vacate discovery orders. The district court had, without *in camera* inspection, ordered production of documents claimed to be privileged.

The Ninth Circuit denied a writ of mandamus on the grounds that the privilege had been asserted by one without standing to assert it. This Court determined that the decision of the court of appeals did not foreclose the possibility of *in camera* review in the district court once the privilege was properly asserted. Accordingly, the Court held that the issuance of a writ of mandamus was inappropriate. *Id.* at 404. Although recognizing that *in camera* review, an avenue well short of mandamus, would properly protect the privilege, the Court in *Kerr* stressed the serious consequences "which could flow from an unwarranted failure by the district court to grant those asserting a privilege the opportunity to have the documents reviewed by the trial judge *in camera* before being compelled to turn them over." 426 U.S. at 405. This Court then said (*id.* at 405):

> [I]t would seem that an *in camera* review of the documents is a relatively costless and eminently worthwhile method to insure that the balance between petitioners' claims of irrelevance and privilege and plaintiffs' asserted need for the documents is correctly struck.

In remanding the case, the Court concluded (*id.* at 406):

> We are thus confident that the Court of Appeals did in fact intend to afford the petitioners the opportunity to apply for and, upon proper application, receive *in camera* review.

In the present case *in camera* review of the documents has been applied for, and denied by decisions of the district court and the court of appeals. The decision below is thus essentially in conflict with this Court's decision in *Kerr*.

**B. Decisions of the Courts of Appeals**

1. The Second Circuit has decided that the crime-fraud exception to the attorney-client privilege requires some showing that the legal advice was related to criminal activity. *See In re Grand Jury Subpoenas Duces*

*Tecum (Corporate Grand Jury Witness)*, 798 F.2d 32, 33 (2d Cir. 1986), where it held (emphasis added):

> The crime/fraud exception to the attorney-client privilege cannot be successfully invoked merely upon a showing that the client was engaged in criminal activity. The exception applies only when there is probable cause to believe that the *communications with counsel were intended in some way to facilitate or to conceal criminal activity.*

2. The Eighth Circuit adopted a similar rule when it held that the legal advice must be sought in furtherance of, or in relation to, the fraudulent or criminal activity. *Pritchard-Keang Nam Corp. v. Jaworski*, 751 F.2d 277, 283 n.5, 284 (8th Cir. 1984), *certiorari dismissed* under Rule 53, 472 U.S. 1022 (1985). *See* McCormick on Evidence § 95, at 229 (E. Cleary 3rd ed. 1984). Indeed, that court expressly rejected the premise, relied upon by the district court below, that merely because a fraud or crime followed the communication with the attorney, the communication was in furtherance of the fraud.

3. Applying this Court's decision in *Kerr* in a situation like this one, where no opportunity for *in camera* review remained available, the Temporary Emergency Court of Appeals granted a writ of mandamus directing a district court in California to vacate a discovery order and review claims of privilege by an *in camera* review. *United States Department of Energy v. Crocker*, 629 F.2d 1341 (Temp. Em. Ct. App. 1980). The *Crocker* case does not involve the crime/fraud exception to the attorney-client privilege, but it expressly rejected the procedure and legal conclusion relied upon by the district court in this case. It said (629 F.2d at 1344):

> As the transcript of argument reflects, the district judge rejected all of DOE's privilege claims, including . . . the absolute attorney-client privilege, solely on the basis of his acceptance of Berry's claimed

> need, without *in camera* review of any of the assertedly privileged documents.

Under these circumstances, the court in *Crocker* directed the district judge to conduct "an *in camera* inspection of the documents," and "to reject Berry's claim to discovery, on the basis of need, of documents which he finds are protected by the proper assertion of the attorney-client privilege." 629 F.2d at 1345.

4. *In re Antitrust Grand Jury*, 805 F.2d 155 (6th Cir. 1986), is a case much like this one where the district court failed to review the documents *in camera*. The Sixth Circuit reversed this decision. It said (805 F.2d at 168)—

> the district court found that since the government had established a *prima facie* case of a Sherman Act violation, all the documents [in question] were communicated or done in furtherance of that violation. It made this determination without reviewing the documents *in camera*. We find this to be plain error.

It added (*id.*):

> Ordering production *en masse* creates the potential that some material not within the scope of the crime-fraud exception could be ordered produced. For example, merely because some communications may be related to a crime is not enough to subject that communication to disclosure; the communication must have been made with an intent to further the crime.

The court also observed (805 F.2d at 168) that "Every circuit that has considered the crime-fraud exception to a claim of privilege has reviewed the documents *in camera* before deciding whether they should be produced."[3]

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[3] Among the nine cases cited are *In re Grand Jury Subpoena Duces Tecum*, 731 F.2d 1032, 1036-39 (2d Cir. 1984) (court of appeals reviewed documents *in camera*); *In re Grand Jury Proceedings (FMC Corporation)*, 604 F.2d 798, 800 (3d Cir. 1979) (district court reviewed the documents *in camera*); *In re Special September*

Even the decision cited by the district court below involved a situation where the district and appellate courts examined documents *in camera* and found *prima facie* evidence that the attorney was involved in illegal conduct. *See In re Berkley & Co., Inc.*, 629 F.2d 548 (8th Cir. 1980).

## II. THE DISTRICT COURT'S EXTENSION OF THE "JOINT-CLIENT" EXCEPTION TO PARTIES WHO WERE NOT CLIENTS OF THE ATTORNEY WAS AN ABUSE OF DISCRETION

The district court clearly erred in ordering production based upon the joint-client exception to the attorney-client privilege.[4] *First*, it was Gottlieb, and Gottlieb alone, who sought discovery from Cadwalader. Gottlieb has never been, nor does he ever claim to have been, a client of Cadwalader. Gottlieb never invested in SGS and never became a limited or general partner of SGS, Cadwalader's client. Petitioner is aware of no case in which a third party, with no attorney-client or fiduciary relationship with the attorney, has been permitted to avail himself of the joint-client exception to the privilege.

*Second*, even if Carr had sought discovery from Cadwalader, he too could not properly rely on the joint-client exception. Carr was not a client of Cadwalader's in any capacity other than as a limited partner of SGS, Cadwalader's client. Carr had no confidential relation-

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*1978 Grand Jury*, 640 F.2d 49, 58 (7th Cir. 1980) (*in camera* review by both district court and court of appeals).

[4] The district court found that the joint-client exception applied only to those matters dating from after Carr's purchase of a partnership interest in SGS. At least as to those documents which predate Carr's investments, the joint-client exception is not an alternative ruling and if the crime-fraud exception is inapplicable, a major portion of Cadwalader's client documents remain protected by the privilege.

ship with Cadwalader that was in any way joint with SGS or Senft. All legal assistance rendered by Cadwalader was rendered to and paid for by SGS and Senft. Thus, Carr did not have any attorney-client relationship with Cadwalader which could support invocation of the joint-client exception.[5]

The District court's finding of a joint client exception based on *Quintel Corp. v. Citibank, N.A.*, 567 F. Supp. 1357 (S.D.N.Y. 1983) (*Quintel-I*"), is without basis in light of a later decision by the same court in *Quintel Corp. v. Citibank, N.A.*, 589 F. Supp. 1235 (S.D.N.Y. 1984) (*"Quintel II"*). Relying upon Ethical Consideration 5-18 of the New York Code of Professional Responsibility, the court in *Quintel II* held that a limited partner is *not* a client of the attorney representing the partnership or the general partners.[6] Cadwalader owed no attorney-client duties to Carr and thus had no confidential relationship with him. Thus there was no basis for requiring production of documents under the joint-client exception.

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[5] *See United States v. Parker*, 58 A.F.T.R.2d 86-5367 (E.D. Pa. 1986). An attorney's representation of a partnership does not create an attorney-client relationship between the individual limited partners and the attorney. *See Hoiles v. Superior Court*, 157 Cal. App. 3d 1192, 204 Cal. Rptr. 111 (1984); *Standing Committee on Discipline v. Roth*, 735 F.2d 1168, 1172 (9th Cir.), *cert. denied*, 469 U.S. 1081 (1984); *Koehler v. Pulvers*, 606 F. Supp. 164 (S.D. Cal.), *aff'd*, 614 F. Supp. 829 (S.D. Cal. 1985); Hazard & Hodes, *The Law of Lawyering: A Handbook on the Model Rules of Professional Conduct* 235-36 (1986).

[6] Ethical Consideration 5-18 provides that:

> [A] lawyer employed or retained by a corporation or *similar entity* owes his allegiance to the entity and not to a stockholder, director, officer, employee, representative, *or other person connected with the entity.*

N.Y. Jud. Law, Code Prof. Resp. E.C. 5-18 (emphasis in original). *Accord Mikropul Corp. v. Desimone & Chaplin-Airtech, Inc.*, 599 F. Supp. 940 (S.D.N.Y. 1984).

## III. THE DECISION BELOW IS ERRONEOUS, AND, IF ALLOWED TO STAND, PRESENTS A SERIOUS THREAT TO THE ATTORNEY-CLIENT PRIVILEGE AND THE WORK PRODUCT DOCTRINE

1. The so-called "crime-fraud" exception to the attorney-client privilege goes back to *Alexander v. United States*, 138 U.S. 353 (1891); its scope is summarized in this Court's decision in *Clark v. United States*, 289 U.S. 1 (1933). Referring to the privilege protecting communications between attorney and client, Justice Cardozo said:

> The privilege takes flight if the relation is abused. A client who consults an attorney for advice that will serve him in the commission of a fraud will have no help from the law.

*Id.* at 15. Stressing the need for evidence that the privilege in fact had been abused, Justice Cardozo continued:

> "It is obvious that it would be absurd to say that the privilege could be got rid of merely by making a charge of fraud." . . . To drive the privilege away, there must be "something to give colour to the charge;" there must be "*prima facie evidence that it has some foundation in fact.*" . . . When that *evidence* is supplied, the seal of secrecy is broken.

*Id.* (citations omitted; emphasis added).

The burden on the party seeking to pierce the privilege is two-fold. *See In re International Systems and Controls Corporation Securities Litigation*, 693 F.2d 1235, 1242 (5th Cir. 1982). *First*, there must be a *prima facie* showing of a crime or fraud sufficiently serious to defeat the privilege. *Second*, "the court must find some valid relationship between the [privileged communication] . . . and the prima facie violation." *Id. Accord, In re Sealed Case*, 754 F.2d 395, 399 (D.C. Cir. 1985); *In re John Doe Corp.*, 675 F.2d at 482, 491-91 & n.7 (2d Cir. 1982); *Lemelson v. Bendix Corp.*, 104 F.R.D. 13, 16 (D. Del. 1984).

2. The record here contains no evidence from which the district court could reasonably have determined that Senft engaged in criminal behavior relating to SGS, the entity about which he consulted Cadwalader. Given the jury's failure to convict Senft on any of the specific counts of the indictment relating to investors in SGS, the reasonable interpretation of the conviction on the conspiracy count is that the conviction related solely to SFI. As to SGS, the district court's reliance on the indictment, without more, clearly was insufficient to make the *prima facie* showing that the client was engaged in criminal activity related to the representation. *United States v. Dyer*, 722 F.2d 174, 178 (5th Cir. 1983) (to defeat the privilege, government "may not rest on an indictment.").

The record also is devoid of any evidence from which the district court could have concluded that the activities of SGS and SFI were so intertwined that when Senft consulted Cadwalader about SGS he was actually seeking advice for SFI. (Indeed, the indictment itself alleged that in 1980 Senft formed SGS and that he consulted with Cadwalader in connection with the SGS offering.) Finally, the district court also ignored the fact that SGS was not indicted or charged with any criminal conduct, and that any privileged communication relating to SGS (as distinct from communications with Senft) thus cannot be subject to disclosure under the crime-fraud exception.

3. Even if a sufficient showing had been made to demonstrate that Senft had engaged in criminal conduct relating to SGS, the district court gave no consideration to the *second* prerequisite of the crime-fraud exception—the showing that the client consulted the attorney *in furtherance of* a crime or a fraud. This separate, second showing is necessary to avoid wholesale abrogation of the attorney-client privilege merely because the client engaged in some criminal activity which may (or may not) be related to the representation. Without such a

showing, there is no basis to assume that the attorney was consulted in furtherance of that crime. Unless this Court directs enforcement of this essential element of the crime-fraud test, the clear precedent emerging from this case is that there is no privilege for *any* communication between a client and his attorney who was consulted during a period in which the client, at any time, engaged in criminal conduct.

Several methods were available by which the district court could have discerned whether communications with counsel, or counsel's work product, were intended to facilitate criminal activity. Clearly, an evidentiary hearing or at least affidavits detailing the circumstances surrounding the representation would have been appropriate. At minimum, the district court should have reviewed the documents themselves as the starting point for determining SGS' purposes in consulting Cadwalader.

## IV. MANDAMUS IS APPROPRIATE SINCE DENIAL OF IMMEDIATE REVIEW AND DISCLOSURE OF THE PRIVILEGED DOCUMENTS WILL RENDER ANY SUBSEQUENT REVIEW MEANINGLESS

This Court has frequently indicated that mandamus, although an exceptional remedy, should be used where there is a clear error in the court below, and where a later appeal is clearly an inadequate remedy. *See Bankers Life & Casualty Co. v. Holland*, 346 U.S. 379 (1953); *Roche v. Evaporated Milk Ass'n*, 319 U.S. 21 (1943). Mandamus is appropriate where, as here, petitioner has shown that its right to the issuance of the writ is "clear and indisputable." *United States v. Duell*, 172 U.S. 576, 582 (1899).

If the district court's order stands, Cadwalader will be prohibited throughout the course of this litigation from claiming privilege as to any document which reflects communications between the law firm and its two clients, or its work product on the matter. Unlike the situation

in *Kerr v. United States District Court, supra,* 426 U.S. 394, no opportunity for *in camera* review remains available. Rather the clear decision of the courts below is that Cadwalader is now foreclosed from seeking *in camera* review of any of the privileged documents. Once the documents are disclosed the privilege is broken. No subsequent appellate process can correct the error.

## CONCLUSION

A writ of certiorari should be granted to review the decision of the court of appeals of the Ninth Circuit. The Court may feel that this is an appropriate case for a grant of certiorari, with summary reversal based upon this court's reasoning in *Kerr v. United States District Court,* 426 U.S. 394 (1975).

Respectfully submitted,

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April, 1987

# APPENDICES

**APPENDIX A**

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

---

Case No.: C 83-7340 (WDK(Px)

ALLAN CARR,

*Plaintiff,*

v.

SENTINEL GOVERNMENT SECURITIES, a New York limited partnership; SENTINEL FINANCIAL INSTRUMENTS, a New York general partnership; SGS, INC., a Connecticut corporation; MICHAEL M. SENFT; CADWALADER, WICKERSHAM & TAFT, a New York general partnership,

*Defendants.*

---

AND RELATED CROSS ACTIONS

---

ORDER RE GOTTLIEB'S MOTION TO COMPEL PRODUCTION OF DOCUMENTS

[Filed Oct. 31, 1985]

The Motion of Third-Party Defendant Daniel M. Gottlieb to Compel Production of Documents came on regularly for hearing on September 30, 1985, the Honorable James J. Penne, United States Magistrate, presiding. Robert A. Merring, a member of Cutler and Cutler, a Professional Law Corporation, appeared on behalf of plaintiff Allan Carr and third-party defendant Daniel M. Gottlieb, and Pamela M. Woods of Paul, Hastings, Janof-

sky & Walker appeared on behalf of defendant and third-party plaintiff Cadwalader, Wickersham & Taft ("Cadwalader").

Having considered Gottlieb's Request for Production of Documents, dated May 17, 1985, Cadwalader's Response to the Request for Production, the evidence presented, the points and authorities submitted by the parties, and the oral arguments of counsel,

IT IS HEREBY ORDERED, ADJUDGED and DECREED:

1. Cadwalader's objections to Gottlieb's Requests Nos. 1, 2 and 3 on the ground of overbreadth are sustained, and the motion as to these three requests is denied without prejudice.

2. Gottlieb's Motion to Compel Production of Documents responsive to Requests Nos. 30, 31, 32 and 33 is denied.

3. Gottlieb's Motion to Compel Production of Documents responsive to Requests Nos. 6, 7, 10, 11, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 34, 35, 36, 37, 38, 39, 40, 41 and 42 is granted, and Cadwalader shall produce said documents no later than one week prior to the scheduled commencement of the depositions of Cadwalader's attorneys in November 1985.

4. Cadwalader shall provide Gottlieb with a verified response indicating those documents which it has actually produced in response to the Request for Production.

5. Gottlieb's request for sanctions and Cadwalader's counter-request for sanctions are denied.

DATED: October 31, 1985

/s/ James J. Penne
THE HONORABLE JAMES J. PENNE
United States Magistrate

SUBMITTED BY:

OLIVER F. GREEN, JR.
DOUGLAS C. CONROY
PAMELA M. WOODS
PAUL, HASTINGS, JANOFSKY & WALKER

By: _____
Attorneys for Defenant
CADWALADER, WICKERSHAM & TAFT

## APPENDIX B

## EXTRACT FROM DECLARATION OF PAMELA M. WOODS FILED IN THE UNITED STATES DISTRICT COURT, BEING A TRANSCRIPT OF THE HEARING BEFORE MAGISTRATE PENNE ON SEPTEMBER 30, 1985

* * * *

Ms. Woods: [Counsel for Cadwalader] Since they've instructed us to . . . assert it on their behalf, I would like to be able to give them an explanation of why it does not apply.

Magistrate Penne: Well, it seems to me that the communications are at issue in a lawsuit, and certainly on balancing the need for the information versus the policy behind the privilege, that the need outweighs the privilege.

Ms. Woods: Your Honor, it is my understanding that that sort of weighing goes only to the attorney work product and not to the attorney-client privilege.

Magistrate Penne: Well, isn't the work product privilege a little tighter privilege than the attorney-client? You've got to do some weighing, and what you say is true, you use it in your work product, but work product is supposed to be even a more strict privilege than the attorney-client.

Ms. Woods: I guess I would respectfully disagree with the Court on that issue.

Magistrate Penne: Mr. Merring? Any comment?

Ms. Woods: I don't recall any citations cited by Mr. Merring for that balancing process.

Magistrate Penne: Well, I think there's . . . I think it's an issue. As I understand this lawsuit, these communications are very definitely at issue, have been placed at issue by both parties.

* * * *

## APPENDIX C

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

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Case No. CV 83-7340-WDK (Px)

ALLAN CARR,

*Plaintiff,*

v.

SENTINEL GOVERNMENT SECURITIES, *et al.*,

*Defendants.*

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## ORDER RE OBJECTIONS TO MAGISTRATE'S ORDER

[Filed Mar. 5, 1986]

This matter is before the Court for consideration of the objections of defendant and third party plaintiff Cadwalader, Wickersham & Taft to Magistrate Penne's Order Re: Gottlieb's Motion to Compel Production of Documents. Having considered the submitted materials, the Court hereby ORDERS that the Magistrate's order is AFFIRMED. This order is based on the following considerations:

1. Upon the timely filing of objections to a magistrate's order on nondispositive matters, the Court "shall modify or set aside any portion of the magistrate's order found to be clearly erroneous or contrary to law." F.R. Civ. P. 72(a); *see generally* 28 U.S.C. Section 636(b)(1)(A) (providing for designation of magistrates to hear and determine pretrial matters, with reconsideration by

the district court of any ruling shown to be "clearly erroneous or contrary to law"). "Moreover, in resolving discovery disputes, the Magistrate is afforded broad discretion, which will be overruled only if abused." *Citicorp v. Interbank Card Ass'n*, 478 F. Supp. 756, 765 (S.D.N.Y. 1979). The order at issue herein was not "clearly erroneous or contrary to law," and it is, therefore, AFFIRMED.

2. Even were the materials sought by third party defendant Gottlieb privileged, the party seeking discovery need only make a *prima facie* showing in order to invoke the "crime/fraud" exception to the attorney-client privilege. *See, e.g., United States v. Hodge & Zweig*, 548 F.2d 1347, 1354 (9th Cir. 1977). It is significant in this regard that defendant Michael M. Senft was convicted of a single conspiracy that included both Sentinel Government Securities ("SGS") and Sentinel Financial Instruments ("SFI"), and that he was indicted on a large number of counts related to SGS—including one count based on transactions with the plaintiff. Especially in light of the extent to which the activities of SFI and SGI were apparently intertwined, the decision of the magistrate is supportable under the crime/fraud exception to the attorney-client privilege. *See generally In re Berkley*, 629 F.2d 548, 552-55 (8th Cir. 1980). Alternatively, the magistrate's ruling is supportable based on the "joint client exception" to the attorney-client privilege, at least as to materials dating from after the plaintiff's purchase. *See Quintel Corp., N.V. v. Citibank, N.A.*, 567 F. Supp. 1357 (S.D.N.Y. 1983).

3. The work product doctrine applies only to materials "prepared in anticipation of litigation or for trial . . . ." F.R. Civ. P. 26(b)(3). It certainly is not clearly erroneous or contrary to law to conclude that the documents requested in the present case do not fit this description. *See, e.g., Garfinkle v. Arcata National Corp.*, 64 F.R.D. 688, 690 (S.D.N.Y. 1974). Moreover, even

were these materials covered by Rule 26(b)(3), the crime/fraud exception, *see supra*, would apply to render them discoverable in this action. *See In re International Systems & Controls Corp., etc.*, 693 F.2d 1235, 1242 (5th Cir. 1982). Finally, even were such documents deemed to be work product not within the crime/fraud exception, their obvious relevance to the instant case would render them discoverable under the balancing approach referenced by Magistrate Penne at the oral hearing on the Motion to Compel. Transcript of September 30, 1985 Hearing at 38-39; *see Hickman v. Taylor*, 329 U.S. 495, 511, 67 S.Ct. 385, 91 L.Ed.2d 451 (1947) ("Where relevant and non-privileged facts remain hidden in an attorney's file and where production of those facts is essential to the preparation of one's case, discovery may properly be had."); *see generally* 8 Wright & Miller, *Federal Practice and Procedure* Section 2025 (1970).

4. Documents dating from after the plaintiff's investment are not *per se* irrelevant. *See* F.R. Civ. P. 26(b)(1) (sufficient that information sought "appears reasonably calculated to lead to the discovery of admissible evidence"); F.R.E. 401 (" 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."). Materials postdating the plaintiff's purchase may indicate a course of conduct by the defendants, and may also help to explain what happened prior to the plaintiff's investment. *See, e.g., Garfinkle, supra.*

5. The objection based on the circumstance that some of the documents sought are also available in the public record is without merit. *See* 8 Wright & Miller, *Federal Practice and Procedure* Section 2014 at 110-11 (1970) ("it is not usually ground for objection that the information is equally available to the interrogator or is a matter of public record"). Similarly, the magistrate's rul-

ings as to overbreadth were not clearly erroneous or contrary to law.

6. The objection to Magistrate Penne's denial of Requests Nos. 1, 2, 3, 30, 31, 32 and 33 was not served and filed within 10 days after entry of the magistrate's order, as required by Federal Rule of Civil Procedure 72(a). In any event, the rulings on these matters were not clearly erroneous or contrary to law.

IT IS SO ORDERED.

DATED: March 5, 1986.

/s/ William D. Keller
WILLIAM D. KELLER
United States District Judge

**APPENDIX D**

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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No. 86-7357

DC# CV-83-7340-WDK
Central California

CADWALADER, WICKERSHAM & TAFT,
*Petitioner,*

vs.

UNITED STATES DISTRICT COURT FOR THE
CENTRAL DISTRICT OF CALIFORNIA,
*Respondent,*

and

DANIEL M. GOTTLIEB,
*Real Party in Interest.*

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[Filed Oct. 24, 1986]

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Before: HUG, POOLE and NORRIS, Circuit Judges

This petition for writ of mandamus is denied. Petitioner has not demonstrated that the district court clearly erred in compelling the production of documents.

## APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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No. 86-7357

DC# CV-83-7340-WDK
Central California

CADWALADER, WICKERSHAM & TAFT,
*Petitioner,*

vs.

UNITED STATES DISTRICT COURT FOR THE
CENTRAL DISTRICT OF CALIFORNIA,
*Respondent,*

and

DANIEL M. GOTTLIEB,
*Real Party in Interest.*

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[Filed Dec. 17, 1986]

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Before: HUG, POOLE and NORRIS, Circuit Judges

The petition for rehearing is denied.